88-1617

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1989

WILLIAM C. HULETT

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Courts below have the right to overturn precedents set by the Supreme Court on the exact same issue, in that an Independent Contractor cannot be an EMPLOYEE of the Government?

2. Is an Independent Contractor, i.e. a Physician, an Employee of the Government, thus allowed to receive disclosures from the Government, without the Government Employee's knowledge or consent?

3. Does a Government Agency have the right to enter into a "Personal Contract" with an Independent Contractor, who, by contract language, is not supervised by the Government, in his day-to-day operations, or is not directed by the Government on how he will conduct his Business?

4. Does a Government Agency have the right to force its Employees, against their will, to be subjected to an unwarranted Psychiatric Fitness For Duty Examination, when specifically prohibited by Office of Personnel Management (OPM) regulations?

5. Does a Government Agency have the right to force its Employees to be subjected to a Psychiatric Fitness For Duty Examination, without benefit of first being subjected to a General Physical Examination, as specified by Federal Statute?

6. Does a Government Agency have the right to collect personal and private data from Non-Medical systems of records, whereby those records shall be disclosed to an Independent Contractor for a medical determination, when prohibited by Federal Statute.

7. Does a Government Agency have the right to force an Employee to be subjected to an unwarranted Psychiatric Fitness For Duty Examination because of remarks he made in duly constituted Union grievances or Equal Employment Opportunity (EEO) complaints, in violation of his rights to freedom of speech and his right to file these grievances and complaints?

8. Does a Government Agency have the right to collect personal and private data from

a Government System of records and disclose that data to an Independent Contractor without the Employee's knowledge or permission. And, does that Agency have the right to collect this data, clandestinely, when the employee has the exact same data in his posession and would be able to rationally explain why the data was generated, especially when this method is mandated by Federal Statute?

9. Do the Courts below have the right to adjudicate second and third order hearsay evidence when not corroborated by affidavit or other documentation by the first person, i.e. the Immediate Supervisor?

10. Does a Government Agency have the right to refuse an employee "an accounting" of his records that were disclosed to an Independent Contractor, when the accounting is mandated by Federal Statute?

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DEPARTMENT OF THE NAVY

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OPINIONS BELOW

1. The opinion of the United States District Court Southern District of Indiana, as an entry and judgement, dated 26 Oct. 1987, is set out as Appendix A.

2. The opinion of the United States Court of Appeals for the Seventh Circuit, as an order and adjudgement, dated 12 Dec. 1988, is set out as Appendix B.

3. A Petition for Rehearing to the United

States of Appeals for the Seventh Circuit was denied by them 30 Jan. 1989, and is set out as Appendix C.

JURISDICTION

4. The United States District Court had original jurisdiction to hear Privacy Act suit pursuant to the Privacy Act of 1974 (Public Law 93-579) and Title 5 U.S.C. Section 552a.

5. The Seventh Circuit of Appeals had jurisdiction to hear appeal pursuant to Title 28 U.S.C. Section 1291.

6. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, PUBLIC LAW, STATUTES, REGULATIONS, AND 56 C.J.S.

CONSTITUTIONAL

7. Amendment I states:

> "Congress shall make no law...abridging the freedom of speech..or the right.. to petition the Government for a redress of grievances."

PUBLIC LAW

8. The Privacy Act (Public Law 93-579) of 1974 states:

> "Sec 2 (a) The Congress finds that----

(1). The privacy of an individual is directly affected by the collection, maintence, use, and dissemination of personal information by Federal agencies;
(4) The right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
(5) In order to protect the privacy of individuals identified in information systems maintained by Federal Agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal Agencies, except otherwise provided by law to--
(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;
(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is necessary and lawful purposes, that the information is current and accurate for its intended use---;
(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority..."

STATUTES

9. Title 5 U.S.C. Section 552a (b),(b)(1), (b)(3), (b)(8), and (e)(2) states:

"(b)--No agency shall disclose any record which is contained in a system of records by any means of communication to any person

or another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosures of the record would be--
(b)(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
(b)(3) for routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D);
(b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
(e) AGENCY REQUIREMENTS
(e)(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs--"

10. Title 5 C.F.R. Part 339 preamble and subpart C, sections 339.302(a) and 339.302(e) states:

"Supplemental Information:
General--OPM published proposed regulations on July 1 1983 (48 FR 30398)--were necessary--because previous authorities to obtain and use medical information, particularly in so-called "fitness for duty" situations, were unclear; and there was substantial evidence that those authorities had been abused, especially in the case of psychiatric examinations---

339.302(a) When an agency orders or offers a medical examination under this subpart, it shall inform the applicant or employee in writing of its reasons for ordering--the examination--;

339.302(e) An Agency shall order or offer a psychiatric evaluation to an employee only when---the Agency has first conducted a non-psychiatric medical examination."

11. Title 5 U.S.C. Section 2105 EMPLOYEE, States:

"(a) For the purposes of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--
(1) appointed in the civil service--
(2) engaged in the performance of a Federal function under authority of law or an Executive act; and
(3) subject to the supervision of an individual named by paragraph (1)--"
Explanatory notes:
Subsection (a) is supplied to avoid the necessity of defining "employee" each time it appears in this title. The subsection is based on a definition worked out independently by the Civil Service Commission and the Department of Labor and in use by both for more than a decade.

REGULATIONS

12. In a letter to all Agency Heads, of which the Navy was a recipient, the Office of Personnel Management issued a clarification to their regulation at 5 C.F.R. Part 339 (1984), which states:

2. What are the instances in which agencies may order employees to undertake medical examinations?
--the authority to order an examination is not really an authority to force someone to see a physician.--decisions about the

individual's qualifications must specifically address the nexus argument--
5. Are there situations where employees may be ordered to take a psychiatric exam without the agency first evaluating the results of a general physical exam?
NO!!
This change is designed in response to concern about inappropriate use of agency ordered psychiatric examinations.
7. What should the agency do if it believes that there is a medical problem which is contributing to an employee's performance problems---?
The supervisor should provide counseling on whether the employee is meeting current performance standards.

13. Naval Weapons Support Center Instruction 12792.1B, Employee Courseling Service, 26 Oct. 1982, states that the first step in the "Flow Chart of Supervision Referral Process" is to: "Job Performance Problem Documented."

14. Federal Acquisition Regulation (FAR) 1984, Paragraph 37.101 and 37.104 states:

"37.101 Definitions. "Nonpersonal services contract" means a contract under which the personnel rendering the services are not subject, either by the contractor's terms or by the manner of administration, to the supervision and control usually prevailing in relationships between the Government and its employees.
"Personal services contract" means a contract that, by its express terms or as administered, makes the contractor appear in effect, Government employees--.
37.104 Personal services contracts.

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor---
(b) Agencies shall not award personal services contracts unless specifically authorized by statute---".

15. Secretary of the Navy Instruction 4200.27A, 23 June 1976, States:

"Unless Congress has passed a specific statute to authorize something different, the Government may not contract out for the services of people who receive their assignments from Government personnel, work under the direct supervision of Government personnel, and who's relationship to the Government is thus no different from that of a Government employee."

16. 56 Corpus Juris Secundum (56 C.J.S.) (Master and Servant) states:

(1b)--generally speaking a servant or employee is a person who renders service to another, usually for wages, salary, or other financial consideration, and who in performance of such service is entirely subject to the direction and control of the other, such other being respectively the master and employer.
(2d)--the relation of master and servant exists when, and only when, the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.
(3(1)) Independent Contractors and their employees, an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without

being subject to the control of his employer except as to the result of his work; an independent contractor is not a servant."

STATEMENT OF THE CASE

17. On 23 Mar. 1984, Petitioner, William C. Hulett's Division Manager, Orville E. Davis unilaterally reassigned Hulett to duties that were unfamiliar and deadly. As stated by Davis, the reassignment was because of statements that Hulett made in a Union grievance against Davis' subordinate and Hulett's Branch Manager, Rolland McMaster. The grievance was because McMaster was needlessly harassing Hulett and the Harassment was affecting Hulett's work, only when he was harassed. Hulett wrote Davis a rebuttal letter and advised him of this. Since Davis was 2000 feet away in another building and did not observe Hulett's working environment, Hulett asked Davis to document his work environment with Hulett's immediate supervisor, Charles Denson. Hulett provided Davis with a local regulation which mandated this documentation before any other actions were

to be taken. No documentation was made.

18. Davis wrote several letters to Doctor Jeffrey R. Barnes, the Respondent, Department of the Navy's Medical Officer, and advised him that Hulett should undergo a Psychiatric-Fitness-For-Duty-Examination (PFDE) because of remarks Hulett made in his grievance. All correspondence was ex parte to Hulett.

19. Dr. Barnes directed Hulett to take the PFDE with a Doctor William Strange, a private contractor psychiatrist in Indianapolis, In. No other physician was listed. There was no record of a General Physical Examination being offered to or taken by Hulett, as required by law. Hulett advised his Union and Dr. Barnes that he strongly objected to the PFDE, THE PFDE WAS UNWARRANTED and was not for medical purposes, but for retaliation because of Hulett's filing Union grievances and Equal Employment Opportunity (EEO) complaints against Davis and his friends. In a letter to Dr. Barnes, Hulett asked

him to document his on-the-job behavior with Denson and Hulett's co-workers to ascertain the true picture of Hulett's dedication to duty and his outstanding work ethics and ability to do his job. Denson had rated Hulett as "Highly Satisfactory" in 1983 and 1984 for his job performance. Denson made no mention of any mental problems in Hulett's job performance rating form. Again, Dr. Barnes refused to physically document Hulett's job performance, on a first person basis, with Hulett's immediate supervisor, Charles Denson. Instead, Dr. Barnes relied totally on second order unwritten hearsay from McMaster and third order hearsay from Davis, in ordering the PFDE.

20. Hulett and his Union Vice President, John Holmes, personally asked Davis why he was subjecting Hulett to an unwarranted PFDE, since Denson did not support or ask for the PFDE. Davis told them that he was subjecting Hulett to a PFDE because:

"Hulett had misquoted him (Davis) once". No medical reasons were given. Holmes and Hulett told Davis that they strongly objected to the unwarranted PFDE and it was for retaliation and not for medical purposes. Holmes documented these statements by sworn affidavit to the Courts.

21. Dr. Barnes again directed Hulett to select from a list of three Contractor psychiatrists, that the Navy furnished Hulett. Dr. Barnes advised Hulett's Union President, Roy Pannell, that if Hulett did not select a psychiatrist, he (Barnes) would subject Hulett to disciplinary action. No reason was given to Hulett as to the need for the PFDE. Again, in a letter to Dr. Barnes, Hulett advised him that he strongly objected to the PFDE and stated that it was designed to downgrade and humiliate him in the eyes of his fellow employees. He, again, advised Dr. Barnes that the PFDE WAS A RETALITORY MOTIVE of Davis and he pleaded with Dr. Barnes to document his on-the-job-behavior with

Denson, mandated by Union procedures and local regulations. Hulett advised Dr. Barnes that if Davis had been interested in Hulett's health, he would not have been assigned to duties that were deadly. Hulett also advised Dr. Barnes that the PFDE was unwarranted because Dr. Barnes knew that Hulett had, on his own volition and expense, sought and gained a favorable unconditional PFDE from an Army certified psychiatrist, for the exact same duties. Hulett advised Dr. Barnes that he done this because he feared that management would force him to take a Navy sponsored PFDE because he (Hulett) had filed so many duly constituted complaints against management because of their continuous harassment of him since he filed an "AGE DISCRIMINATION" complaint in 1976. Hulett's Union President phoned Hulett and stated that Dr. Barnes would not honor the above request and that he should select a psychiatrist to avoid insubordination charges from Dr. Barnes. Hulett selected Dr. Shriner from Terre

Haute, only because he was the closest to Hulett's home town. Hulett's wife was very upset because of Dr. Barnes Harassment of him and it caused her considerable trauma, because Dr. Barnes was also her private physician (as a retired military spouse).

22. Dr. Barnes wrote a letter to Dr. Shriner and asked him to do a PFDE on Hulett, effectively entering into a non-personal contract with Dr. Shriner. Dr. Barnes is an M.D., not a psychiatrist. There were NO PSYCHIATRISTS working with Dr. Barnes who worked for the Navy, as the Appeals Court stated. The reasons Dr. Barnes gave Dr. Shriner for the PFDE were:

a. Hulett was disruptive to the work-force.

b. Hulett wrote numerous Union grievances and complaints.

c. Hulett used the phrase "Management Buddy System" many times in the grievances and complaints.

No documentation was submitted to Dr. Shriner, by Denson, to support Dr. Barnes' false

allegations that Hulett was "disruptive to the workforce". Conversely, Denson rated Hulett as "Highly Satisfactory" and lauded him for his efforts in helping fellow employees. As an attachment to his letter, Dr. Barnes disclosed (238) pages of Hulett's personal and private records to the non-government contractor. Only (15) pages were of a medical nature. Of those, only (7) pages were from the Navy Civil Service system of files, which consisted of a dissertation, by Hulett, about management harassment of him. The other medical records were private records kept in a Military Dispensary System of records, as Hulett's right as a Military Retiree. The disclosure of Hulett's Military records, for Civil Service purposes, violated the "PRIVATE DOCTOR PATIENT CONFIDENTIALITY RELATIONSHIP". The non-medical records were kept in a separate system of records and were not maintained for medical purposes or for routine scrutiny of medical personnel. The non-medical records con-

sisted of DULY CONSTITUTED UNION GRIEVANCES AND EEO COMPLAINTS, not yet consumated. The disclosure of all of the records was ex parte to Hulett. Dr. Barnes made no attempt to collect the non-medical records directly from Hulett, as required by law, in order that Hulett could rationally explain the reasons for the grievances and complaints, and their status to Dr. Barnes.

23. In a letter to Hulett, Dr. Shriner explained that Dr. Barnes had unilaterally disclosed the records to him. Dr. Shriner indicated that he did not ask for the records in order to make an evaluation of the PFDE. Dr. Shriner indicated in his report to Dr. Barnes, that Hulett did not need the PFDE and no follow-up was required. Dr. Shriner did indicate that Hulett had a copy, in his possession of all of the non-medical records, disclosed by Dr. Barnes, and Hulett did rationally explain the reasons for the grievances and complaints. Dr. Shriner did require Hulett to sign a release form in order for Dr. Shriner to

release his report of the PFDE to Dr. Barnes. Dr. Shriner did not mention the disclosures during the PFDE, however, he did mention them in his report to Dr. Barnes, one day later. Dr. Shriner, in his report, mentioned that Hulett objected to the PFDE and the method used by the Navy in subjecting him to the PFDE. If Dr. Shriner had been an "Employee" of the Navy, as the Courts stated he was, he would not have been required, by law, to get a release in order to disclose his own report to the Navy.

24. Hulett asked the Navy for an accounting of the disclosures, as required by Statute and OPM regulations. The Navy refused, stating that Dr. Shriner was an AGENT of the Navy, therefore an accounting was not necessary. Hulett then filed a Privacy Act suit in U.S. District Court, against the Navy because:

a. Dr. Barnes disclosed (238) pages of his personal and private records to a non-government contractor without his knowledge or consent.

b. Dr. Barnes made no attempt to collect the non-medical records from Hulett in order that he could rationally explain the reasons for their existence and status.

c. The disclosures contained false and misleading information and was designed to stigmatize him with a PFDE, humiliate him, degrade him, embarrass him, cause him mental anguish, and ruin his outstanding reputation.

d. The disclosures were not for a routine use for which they were filed and stored, but were disclosed as a retaliation to satisfy personal desires, in violation of a Congressional mandate.

e. The disclosures were to support an unwarranted PFDE and the PFDE was not authorized by statute or regulation.

f. The Navy was not authorized to enter into a personal contract with an independent contractor.

g. The disclosures were unwarranted

because Hulett had already gained an unconditional favorable PFDE, on his own volition and expense, for the exact same duties, from a certified psychiatrist.

The U.S. District Court Affirmed the Navy's motion to dismiss on Summary Judgment, stating that Dr. Shriner was an employee of the Navy, the PFDE was authorized, and there was a need for the PFDE. The Court did not argue the merits of Hulett's opposition to the Navy's motion for summary judgment. There were no stipulations made that agreed to a basis for these decisions.

25. Hulett appealed the U.S. District Court's decision to the Seventh Circuit of Appeals because the lower Court's decision was not uniform to Supreme Court and other lower Court's decision. The Appeal Court affirmed the lower Court's decision, stating that Dr. Shriner was an employee of the Navy, thus authorized to receive disclosures from Dr. Barnes without the permission or knowledge of Hulett. During the appeal process,

the Navy and the Court reinforced the fact that the PFDE was partially based on the Phrase "Management Buddy System" that Hulett used in his grievances and complaints. This alluded to the Navy's and the Court's contention that Hulett had no right to use the phrase, and the use thereof, somehow, made him mentally unstable. Therefore, the Navy had a right to subject him to the PFDE because he used the phrase several times. This is tantamount to denying Hulett his rights to "Freedom of Speech and Freedom to file duly constituted grievances and complaints" because he was being harassed by the Navy. Hulett proved to both Courts that the phrase "Management Buddy System" had been used in government publications, because the system was of public concern and had the interest of Congress.

26. Both Courts' language and decisions were mostly based on an unsworn and undocumented statement made by Dr. Barnes. Dr. Barnes' statement was a accumulation of

unwritten statements made to him by McMaster and Davis. No documentated statement of affidavit was made by Hulett's immediate supervisor, Charles Denson. Therefore, the Courts' decisions were mostly based on undocumented second and third order hearsay evidence from Dr. Barnes. None of Hulett's documentated evidence was articulated by the two Courts. Both Courts below have effectively reversed and invalidated precedents set by the Supreme Court and other lower Courts.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

27. The Seventh Circuit of Appeals Court has decided important Constitutional questions that are not consistant with Supreme Court decisions and other lower Court decisions. Their decisions have set the Congressional Mandated Privacy Act of 1974 back to the prehistoric days and have effectively nullified ALL of the Congressional efforts. Their decision has sent a clear signal to all Government Supervisors that they can violate an employee's Constitutional

rights and not be held accountable in the Courts, simply because Federal Law prohibits that they personally be held responsible for their unlawful acts.

28. Since the Government has allowed its supervisors to violate so many of Hulett's rights, have violated Federal Statutes, and have violated their own regulations, it is imperative that this writ be approved, in order to prove to the citizens of these United States that they can secure their Civil Rights in the Courts.

29. The Appeals Court's decisions were not uniform to Supreme Court and Lower Court precedents, articulated as follows:

30. Logue v. United States, 412 U.S. 521 (1973). The Supreme Court Stated:

> "The distinction between a servant relationship and that of an independent contractor, where the relationship is fixed by contract, turn "on the absence of authority in principal to control the physical conduct of the [alledged employee] in [the] performance of the contract"."

31. United States v. Orleans, 425 U.S. 807 (1976). The Supreme Court Stated:

> "The Supreme Court stated as in Logue and added "A critical element in distinguishing an Agency from a contractor is the power of the Federal Government to control the detailed physical performance of the contractor"."

32. Wood v. Standard Products Co.Inc., 671 F.2d 825 (4th Cir. 1982). The Appeals Court stated:

> "It would seem beyond controversy that, under these controlling authorities (Logue and Orleans), only where the Government has the power under the contract to supervise a contractor's "day-to-day operation" and to "control the detailed physical performance of the Contractor" can it be said that the contractor is an employee or Agent of the United States within the intendment of the "Act". There is no language supportive of a distinction between the relationship of physicians under a contract for services and that of all other contractees and could not separately stand the test of being an employee of the U.S. Government."

33. Tennessee Valley Appliances, Inc. v. Rowden, 146 S.W.2d 845 (Middle section 1940). The Court Stated:

> "If employer paid social security tax on employee, this would be a circumstance of the existance of master-servant relationship, because the Social Security Act covers only employees, and the term employee does not cover an independent contractor."

34. Johnson v. Department of Treasury,I.R.S., 700 F.2d 971 (5th Cir. 1983) The Court stated:

> "On January 15, 1979, in an order ruling on cross-motions for summary judgement, the District Court found an intentional violation of Title 5 U.S.C. section 552a(e)(2) "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights--."

Note 10 states: " The Federal Privacy Act draws upon Constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information gathering practices."

35. U.S. v. Short, 240 F.2d 292 (9th Cir. 1956). The Court stated:

"An Administrative regulation promulgated within the authority granted by statute has force of law and will be given full effect by the Courts."

CONCLUSION

36. For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM C. HULETT, pro se

A P P E N D I C E S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

WILLIAM C. HULETT, Plaintiff,	)	
v.	)	Cause No. TH 85-310-C
DEPARTMENT OF THE NAVY, Defendant.	)	

ENTRY

This cause has been presented to the Court on the Department of the Navy's Motion for Summary Judgment.

Plaintiff has filed a suit alleging that the defendant has willfully and intentionally disclosed plaintiff's personnel and medical records to a Dr. William Shriner in violation of 5 U.S.C. 552a(b)(1). The parties have presented to the Court stipulations regarding the facts of the matter. One of the stipulations is dated March 31, 1987 and signed by both parties, and the other one was filed April 24, 1987. The stipulations reveal that the defendant, Department of the Navy, operates the Naval Weapons Support Center at Crane, Indiana.

The stipulations further show that the Plaintiff was a technician who worked in an area that was potentially hazardous to himself and others and that he was employed at the Naval Weapons Support Center. The stipulations further show that the Naval Weapons Support Center operated a medical facility and employed one Dr. Jeffrey R. Barnes as a Medical officer and that Dr. Barnes maintained medical records relating to the plaintiff. Stipulation No. 6 of the April 24, 1987 stipulations sets out that "The Naval Weapons Support Center, at all materially pertinent times, was permitted to use physicians in private practice, not employed by the Navy or the Naval Weapons Support Center on a full time basis, through contracting procedures authorized by statutes, regulations, rules, directives, or other appropriate forms of authorization." The parties further stipulated that a fitness for duty examination was ordered for the Plaintiff and in Stipulation 10 the parties agreed "That the Plaintiff was permitted

to, and did select, at the defendant's expense, from a list of three psychiatrists, William Shriner, M.D., of Terre Haute, Indiana, as the examining physician for the fitness for duty examination." The parties further stipulated that Dr. Shriner was engaged by the Naval Weapons Support Center to perform an examination of the plaintiff (Stipulation No. 11). Stipulations 12 through 16 are set out as follows:

> 12. "Dr. Barnes furnished to Dr. Shriner various records. These records consisted of, copies of psychiatric evaluations conducted on the Plaintiff in 1982; a chronological summary of the Plaintiff's work assignments for the period 1976-83 and the plaintiff's complaints against his supervisors during that period; a packet of materials generated against a "management buddy system"; and, a copy of the position description of the Plaintiff.
>
> 13. On June 13, 1984, plaintiff was examined by William Shriner, M.D. of Terre Haute, Indiana pursuant to an oral contract with the Naval Weapons Support Center.
>
> 15. William Shriner, M.D. of Terre Haute, Indiana, performed a fitness for duty examination, as requested, and delivered to the defendant a psychiatric evaluation of the Plaintiff.
>
> Hulett's note: Stipulation 16 was not listed.

To iterate, the issue is whether or not Dr. Barnes' furnishing records to Dr. Shriner

without the approval of the Plaintiff violates the Privacy Act of 1974, 5 U.S.C. 5552a (sic). The dispositive portion of that statute is subsection (b)(1) which states as follows: "Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent, of the individual to whome(sic) the record pertains, unless disclosure of the record would be--(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties."

Was Dr. Shriner an employee of the agency who had a need for the record in the performance of his duties? Dr. Shriner's services were required because Dr. Barnes felt that a fitness for duty examination was approprate under the circumstances at the time. 5 CFR Part 339 1985 sets out the following regulation:" An agency may require an individual who...occupies a position which has physical/Medical standards for selection or retention...to report for a medical evaluation..(3) whenever there is a direct question about an employee's continued capacity to meet the physical or medical requirements of the Position."

Dr. Barnes, therefore, had the authority to require the Plaintiff to undergo a fitness for duty examination. Certainly, the

individual doctor selected to do that examination would qualify as an employee or even a contractor of the government. The case of Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982) lends some assistance to the analysis of this case. In that case, the individual's EEO files were reviewed by the individuals in the Department of the Army. The Court found that when the EEO files were maintained by the Department of the Army and that those files were released to officers for review, and that that release did not violate the Privacy Act as the release was done in furtherance of the performance of the duties of the officers reviewing the files. There is an obvious parallel in this case. The files were released to the psychiatrist in the performance of his contractual duties to the Navy. Files in the instant case and files in the Hernandez case were being reviewed and analyzed to determine whether any adverse personnel action should be taken against the plaintiff based on his action.

The Hernandez Court found that not to be in violation of the Privacy Act.*

This Court, therefore, holds as a matter of law that a release of records as those contained in the file of the Plaintiff in this case (see Stipulation Paragraph 12) to a psychiatrist for the purpose of assisting in performing a fitness for duty examination does not violate the Privacy Act and is exempted from the Privacy Act by section 552a(b)(1). In addition, a contractor hired to further the purposes on an authorized examination is an employee under this section.

The Department of the Navy's Motion for Summary Judgment is therefore SUSTAINED.

Dated this 26th day of October, 1987.

S/Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

* Hulett's Note: All parties in the Hernandez case were bonafide employees of the Department of the Army.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

WILLIAM C. HULETT, Plaintiff,	)	
v.	)	Cause No. TH 85-310-C
DEPARTMENT OF THE NAVY, Defendant.	)	

JUDGMENT

The Court having this date made its Entry in the above cause on defendant Department of the Navy's Motion for Summary Judgment, such Entry being the followoing (sic) words and figures, to-wit:

(H.I.)

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant Department of the Navy's Motion for Summary Judgment is granted and the Court now enters judgment in favor of the Defendant Department of the Navy and against the Plaintiff William C. Hulett.

Dated this 26th. day of October, 1987.

S/LARRY J. MCKINNEY,JUDGE
LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
Submitted November 17, 1988

December 12 1988

Unpublished order
not to be cited
per circuit rule 53

Before

Hon. William J. Bauer, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

William C. Hulett,)
Plaintiff-Appellant,)
)
No. 87-3071 v.) *
)
Department of the Navy,)
Defendant-Appellee.)

*Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. No. 85-C-310, Larry J. McKinney, Judge.

ORDER

William Hulett, proceeding pro se, appeals from the district court's grant of summary judgment in favor of the Department of the Navy. The district court held that the Navy did not improperly disclose Hulett's

medical and personnel records without his consent in violation of the Privacy Act, 5 U.S.C. 552a. We affirm.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App.P.; Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

The parties stipulated below to the following facts. In 1984, Hulett was a civilian employee with the Department of the Navy at the Naval Weapons Support Center in Crane, Indiana. At the Center, Hulett was employed as a skilled technician and worked with high voltage test equipment which was potentially hazardous to himself and others. Hulett's particular job had physical and medical standards for retention and selection. In March 1984, Jeffrey Barnes, the Center's Medical Officer, received a request from Hulett's supervisor to evaluate Hulett's continued fitness to perform his job.[1]

1 Dr. Barnes' affidavit and other supporting doc-

uments disclose that Hulett's supervisor noticed "unusual behavioral abnormalities" resulting from an obsession and preoccupation with the department's "management buddy system." Apparently, Hulett perceived all supervisory directions or requests as harassment, and he demonstrated frequent and sudden mood shifts during work. Hulett had twice before received psychiatric evaluations; in one, he was diagnosed as a possible paranoid schizophrenic. As recent as February 1984, Hulett had reported to the Center's clinic complaining of stress and depression. Hulett's Note *

The Center was equipped to perform the examination on the premises with existing personnel, but pursuant to the collective bargaining agreement with Hulett's Union, Hulett requested that the examination be conducted by a physician in private practice at the Navy's expense. Hulett selected Dr. Shriner from a list of three certified psychiatrists, and Dr. Barnes arranged for Dr. Shriner to examine Hulett. Dr. Barnes also furnished Dr. Shriner with copies of Hulett's previous psychiatric evaluations, a chronological summary of Hulett's work assignments from 1976 to 1983, Hulett's complaints against his supervisors, a packet of material generated by Hulett in which Hulett stated his suspicions of the Navy's

"management buddy system", and a job description of Hulett's current position. Dr. Shriner conducted the examination and reported to the Navy his results. Hulett later requested, and was provided copies of the records disclosed to Dr. Shriner and copies of Dr. Shriner's evaluation. Hulett then filed this action, alleging that he did not consent to the disclosure of his medical and personnel records to Dr. Shriner and the disclosure of these records was therefore in violation of the Privacy Act, 5 U.S.C. 552a.[2] The district court relied upon the exemption in Section 552a(b)(1) of the Act which provides that disclosure of the records is appropriate whenever the "officers and employees of the agency which maintains the record... have need for the records in the performance of their duties. The district court concluded that Dr. Shriner was an "employee of the agency," and, under the circumstances, he had need for the documentation provided him. On appeal, Hulett challenges both of these findings.[3].

[2]On the date of the examination by Dr. Shriner Hulett signed an authorization form for the exchange of medical records between Dr. Barnes and Dr. Shriner. We cannot tell from the record whether the Dr. Barnes' disclosure was made before this date, but we assume that it was and this authorization was therefore not "prior written consent" as required by 5 U.S.C. 552a(b). In any event, this authorization form was limited to medical records and did not permit the disclosure of personnel records.

[3]Although Hulett lists four issues in his brief, these issues, when distilled, challenge the two findings.

II.

Since the parties stipulated in the district court to the essential facts of this dispute, our review of the district court's summary judgment focuses on whether the Navy was entitled to judgment as a matter of law based on these underlying facts. Our review is de novo. Commercial Union Insurance Co. v. Ramada Hotel Operating Co., 852 F.2D 298, 300 (7th Cir. 1988).

Hulett first challenges whether a contractor hired by the Navy to conduct a medical examination is an "officer or employee" of the Navy for purposes of Section 552a(b) of the Privacy Act. In the absence

of any statutory definition and case law, the district court reasoned that any doctor selected to perform a fitness for duty examination at the behest of the agency would qualify as an "employee" since the Navy was authorized to conduct the examination; it did not matter that the doctor selected was not among the salaried personnel of the agency. We agree.

Section 552a(b)(1) was never intended to restrict an agency's ability to disseminate information to those within the agency who required certain records and information in the performance of their duties. To that end, the exemption provided in Section 552a(b)(1) allows a free flow of information within an agency to those who require it. Section 552a(b)(1) controls, however, interagency disclosures of records or personal information that might be salacious or damaging to character or reputation and might be sought for personal, political, or commercial motives unrelated to the agency's admin-

istrative mission. See S. Rep. No. 93-1183, 93 Cong., 2d Sess.; reprinted in 1974 U.S. Code Cong. and Admin. News 6966. Hulett apparently does not dispute this interpretation but claims that Dr. Shriner was not properly within the agency and not entitled to receive the records since he was neither an "officer" nor an "employee" of the Navy.

Under normal circumstances, Hulett's Medical examination would have been performed by Dr. Barnes or another Navy doctor at the Center. These doctors properly would have had access to Hulett's records, assuming these records were required for the evaluation. Hulett's request, pursuant to the collective bargaining agreement, to have a physician from private practice examine him did not alter the task facing the examining doctor, nor did it lessen the doctor's need for the records. Hulett presents no logical reason why a doctor hired by the agency (at Hulett's request) to perform a function normally

performed by the agency should not be entitled to receive the same records the agency's doctors would receive. Under these circumstances, we conclude that a doctor hired by an agency should be considered no different from an officer or employee of the agency for purposes of Section 552a(b)(1).

Hulett next challenges the Navy's authority to require him to submit to a fitness for duty examination. We conclude the Navy was clearly authorized to require Hulett, who occupied a position which had medical standards for retention, to submit to a medical evaluation because "there [was] a direct question about the employee's continued capacity to meet the physical or medical requirements of the position.[4] 5 C.F.R. 339.3-1(a)(3) (1988). Hulett's supervisor expressed concern over Hulett's ability to meet the job requirements and requested that Dr. Barnes verify that Hulett was medically capable of performing the job. To this end, and at Hulett's

request, Dr. Barnes contracted for the services of Dr. Shriner. We find no irregularities in this procedure to suggest that the examination was not warranted or that the services which Dr. Shriner provided were not authorized.

Finally, Hulett questions whether Dr. Shriner had a need for the records in performance of his task. 5 U.S.C. 552a(b)(1). On appeal, Hulett attributes ulterior motives to his supervisor in requesting that Hulett be required to undergo a medical examination. Hulett suggests that this action was done in reprisal for Hulett's numerous union grievances against the Navy. Even assuming this were true, we can find no impropriety in the resulting disclosure of records. The regulations provide that a physician conducting a fitness for duty examination must be provided with "any approved medical evaluation protocol, any applicable standards and requirements for the position, and/or a detailed description of the duties of the position.....

physical demands, and environmental factors." See 5 C.F.R. 339.302(c) (1988). The records which Dr. Barnes disclosed to Dr. Shriner were within the scope of the regulations and were required for an informed evaluation of Hulett's medical condition. The documents evidencing Hulett's preoccupation with supervisory personnel and his statements as to their effect on his job performance were entirely relevant to the inquiry facing the examining physician: Did Hulett suffer from any mental disorder that would interfere with his job responsibilities and endanger himself and others? We conclude that Dr. Barnes had need of these documents in performance of his evaluation of Hulett.

Accordingly, the judgment of the district court is AFFIRMED.

[4] Although Hulett contends that this regulation was not in force at the time of the examination, the source of this regulation was 49 Fed. Register 1328, January 11, 1984. The regulation has remained unchanged since its enactment.

* Hulett's Note: Diagnosis of possible paranoid schizophrenic was made by an Army reserve Medical Doctor (not a psychiatrist), 8 July 1982. Diagnosis was not supported by a certified psychiatrist on a second visit, 30 Nov. 1982. Records to this effect were furnished to the Courts.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 12, 1988

Before

Hon. WILLIAM J. BAUER, CHIEF JUDGE

Hon. DANIEL A MANION, CIRCUIT JUDGE

Hon. MICHAEL S. KANNE, CIRCUIT JUDGE

WILLIAM C. HULETT,
Plaintiff-Appellant,

v. No. 87-3071

DEPARTMENT OF THE NAVY,
Defendant-Appellee. *

* Appeal from the United States District Court for the Southern District on Indiana, Terre Haute Division. No. 85 C 310 Judge Larry C. McKinney

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED BY this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 30, 1989

Before

Hon. WILLIAM J. BAUER, CHIEF JUDGE

Hon. DANIEL A MANION, CIRCUIT JUDGE

Hon. MICHAEL S. KANNE, CIRCUIT JUDGE

WILLIAM C. HULETT) *
Plaintiff-Appellant,)
)
No. 87-3071 v.)
)
DEPARTMENT OF THE NAVY,)
Defendant-Appellee.)

* Appeal from the United states District Court for the Southern District of Indiana, Terre Haute Division. No. 85 C 310 Larry J. McKinney, Judge.

On consideration of the petition for rehearing filed in the above-entitled cause by Plaintiff-Appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.